The Circuit Court

for the Sixth Judicial Circuit
of Michigan

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RUDY J. NICHOLS
CIRCUIT JUDGE

OAKLAND COUNTY

July 28, 2006

MSC Clerk
P.O. Box 30052
Lansing, MI 48909
Cc: SJI Chair – State Bar CJ MSC

RE: ADM File No. 2005-19

To Whom It May Concern:

After conducting close to probably 500 jury trials over the last 15 years or so, I read with great interest the proposed rules to modernize our rules concerning jury trials. I applaud these efforts in the vast majority of ways mentioned, and believe they will go a long way towards improving the way our jury trials are conducted. My specific reference here is to proposed rules 2.512(A)(5) [Not requiring theories of the case], 2.513(E) [Reference documents], (F) [Deposition summaries], (G) [Scheduling expert testimony] and 2.514 and 2.515 [regarding Verdicts].

There are a few rules changes, however, that should be scrapped in their entirely, or where at least minor changes should be considered.

I learned a decade and one-half ago that nothing was more embarrassing as a trial judge than to have two attorneys arguing to a jury that different issues are involved – and in one case, that different law (Opening Statements) – applied as well! That's why the **proposed rules 2.512 (A)(1) and (2) should be completely rewritten** as follows:

Insofar as 2.512(A)(1) and (2) is concerned, I propose that instructions, issues and theories be determined before the jury is seated. The effect of the two proposals as suggested would be tantamount to new

causes of action, or at least theories of liability, being raised in the middle of a case, virtually without notice to anyone. This has some very serious consequences, the most important of which is the potential for "endless" cases that simply never reach finality.

I realize that some issues (or, more likely, instructions) can not be completed before trial, but suggest that probably 95% or more of them can and should be done before the jury arrives.

There is nothing more awkward than to have attorneys arguing different issues (and law), and then having to spend endless minutes and even hours to make complicated decisions on sometimes complicated instructions, while a minimum of 14 people (and perhaps higher if witnesses are included) are waiting. This is not a service to the public, as our canons dictate, but a genuine disservice to jurors and litigants alike in that it constitutes a significant waste of their time on topics that can be worked out before they arrive. (My own approach to this, which may or may not be relevant for you, is to have Plaintiff [for claims], and Defendant [for counter-claims], resolve these in advance of trial at motion calls – see attached Final Trial Order).

MCRs 2.512(A) and (B) as now proposed will result in unimaginable delays, a waste of energy and needless time of attorneys, litigants and jurors alike, and will breed cynicism and disrespect towards our legal system due to the built in delays they will foster. **Please carefully consider the practical application of these rules, and the results their ripple effects will surely have, before adopting them.**

Regarding 2.513(A) and (N)(3) [Instructions], I would propose that only one copy of instructions be required, and more if the trial judge so orders. To require each juror to have a copy is simply too burdensome, time-consuming and wasteful. Again, it is the practical application of these rules in the trial court environment affecting both the litigants and jurors (i.e., the public) that should be contemplated.

Regarding 2.513(B) [Court's responsibility], I would propose "The Court may not communicate with the jury or any juror **on any nonprocedural matter** pertaining to the case without notifying the parties and permitting them to be present." This would be more consistent with existing case law and would allow court personnel to talk to jurors on matters concerning arrival times, departure times, recesses and lunches in a way the proposed rule now appears to exclude.

Rule 2.513(I) [Juror questions], while helpful, could have a built in bias that helps the party having the burden establish in his or her case (or

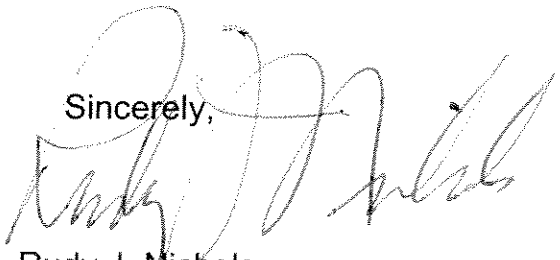
defense). The fact that such questions may be on a random basis does not make their effects any less biased. By rule, we would be intervening in a burden our legal system imposes in order to establish a claim or defense. If allowed to be done, it should also require that follow-up questions may be made by the party's attorneys.

Jury discussions before all the evidence is in [Rule 2.513(K)] is fraught with perils in that a premature opinion, even decision, could occur. While the rule attempts to minimize that, I would strengthen its provisions, particularly the second half of the last paragraph, by mandating the trial judge give a cautionary instruction that all such discussions must be tentative and that their minds should remain open for all the evidence and instructions yet to be presented. (I intentionally leave out "and argument", since we tell jurors over and over that argument is not evidence, that evidence is testimony under oath and admitted exhibits, and that that is what their verdict is to be based upon… evidence).

As I mentioned earlier, most everything can and should be worked out regarding jury instructions <u>before the jury is seated</u>. That's why 2.513(N) [Final instructions] should be revisited. Yes, there are times questions of fact drive an instruction late in a case, or, more rarely, where an issue has been tried with the implicit consent of the parties. However, a trial is about preparation, and in over 95% of the cases (or higher), attorneys know what the facts are that will be tried and what law that is to be applied <u>before</u> the jury is called.

To summarize, these rules appear to be a wonderful move in the right direction. But for the benefit of the jurors and the litigants, I strongly encourage the Committee look very closely at the issues mentioned above, **particularly in having issues and instructions worked out in advance**. These two, more than anything else, will ensure an efficient, orderly and timely presentation of the cases for the benefit of the public we serve.

Sincerely,



Rudy J. Nichols
Circuit Court Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

_____,

Plaintiff,

Case No.
HON. RUDY J. NICHOLS

V

_____,

Defendant.
_____/

FINAL TRIAL ORDER

The objective of this order is to require the parties to be fully prepared and be ready for jury trial on _____. The failure of any party to comply with the intent of this order can expect a default, dismissal or any other appropriate sanction, including monetary costs, striking or precluding witnesses or testimony, limiting examination, waiver, or the like.

IT IS ORDERED THAT:

(1) Plaintiff and Defendant shall notify the judge's clerk by noon _____, of a settlement decision, if any.

(2)A list of witnesses, including those to be called via deposition, that will testify for each party at trial, shall be submitted to the Court and opposing counsel by _____. Any witness listed not called can result in a sanction of $250 unless good cause is shown. Any objections to those witnesses by the opposing side(s) shall be properly noticed by that side and a ruling obtained as to that or those witness(es) testimony by _____.

If there is any possibility the Court will be asked to review an expert's qualification under the MREs or case law, the proponent of that expert shall notify the Court and opponent by motion filed and praeciped for hearing no less than three (3) weeks before trial, or said testimony shall be deemed waived.

(3) The length of the plaintiff's opening statement shall not exceed ____ minutes. The plaintiff's closing statements shall not exceed _____ minutes. The

defendant's opening and closing statements shall be limited in the same manner.

(4) Evidentiary objections to **all** depositions, experts or other witnesses, or any evidence now existing, shall be ruled upon, with proper notice to opposing counsel, by noon on _____, or they shall be deemed waived. Any other preliminary or pretrial motion must likewise be filed and heard by the Court no later that _____ with proper notice to opposing counsel.

(5) Plaintiff's attorney(s) shall submit jury instructions proposed to be read to the jury in this case to opposing counsel by _____. Defendant shall, by praecipe and motion filed no later than _____, object in writing to each instruction it finds objectionable and include additional instructions Defendant believes are necessary, including legal support for the same. The instructions shall be in final form no later than Wednesday _____, with the Court's rulings as may be necessary that day on the record for any differences that exist. Any such differences shall be placed on the record by Plaintiff's attorney and shall be supported by appropriate legal authority cited by Plaintiff's and Defendant's attorneys.

The instructions shall be prepared by Plaintiff's attorney into a final packet, including a verdict form to be used by the jury, no later than _____. Each instruction shall be in proper numerical order, commencing with SJI 3.01 through 60.01, on plain white paper, properly entitled, without commentary, with all appropriate phrases stricken and blanks appropriately filled. Failure to comply with these requisites may result in the striking of a claim or defense, if appropriate.

(6) The parties shall provide the Court and each opponent with an exhibit list of every exhibit to be used at trial no later than _____. Plaintiff's exhibits shall be given consecutive numbers, and Defendant's exhibits shall be given consecutive alphabetical letters. All objections to the proposed exhibits shall be noticed for hearing and decided no later than _____, or those objections shall be deemed waived.

(7) Only one attorney per party may make an opening and closing statement. Two trial attorneys representing the same litigant will not be permitted to examine the same witness. All parties shall be present unless excused by the Court.

(8) The Court will conduct Voir Dire. Proposed questions to the jury must be submitted to the Court no later than noon _____. Submission of a question does not mean that the Court will ask it; that is, the Court will only ask questions that will disclose a juror's potential bias or unfairness. Argumentative questions suggesting an outcome favoring the proponent of

the question will not be asked. Counsel of record shall be responsible for making his/her own record of any objections during trial.

(9) The attorneys shall reasonably estimate the actual number of trial days each side will require, and inform the Court of same. The jury will be instructed that proofs and arguments in this matter will conclude in approximately _____ day(s) based on the approximate number of witnesses that will testify.

(10) The **jury shall hear evidence** on Monday, Tuesday and Thursday from 8:30 a.m. to 12:00 p.m., and 1:00 p.m. to 4:30 p.m. The Court may also require the parties to present evidence on Wednesday beginning at 1:00 p.m. and/or Friday beginning at 1:00 p.m.

Date: _____

_____
HON. Rudy J. Nichols
Circuit Court Judge